

December 9, 1999

NOT FOR PUBLICATION
UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUIT

Barbara A.
Schermerhorn
Clerk

IN RE JOHN R. GUTHRIE, doing
business as Carman's Greenhouse, and
KATHY L. GUTHRIE,

Debtors.

BAP No. EO-99-018

KENNETH G. MATHER, Trustee,

Plaintiff – Appellee,

v.

BANCFIRST of Muskogee, Oklahoma,

Defendant – Appellant.

Bankr. No. 96-71351

Adv. No. 98-7084

Chapter 7

ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the Eastern District of Oklahoma

Before PUSATERI, CLARK, and BRUMBAUGH, Bankruptcy Judges.

CLARK, Bankruptcy Judge.

BancFirst of Muskogee, Oklahoma (“BancFirst”) appeals a judgment of the United States Bankruptcy Court for the Eastern District of Oklahoma in favor of the Chapter 7 trustee (“Trustee”), avoiding certain prepetition transfers made by one of the debtors to BancFirst under 11 U.S.C. § 547(b).¹ For the reasons set forth below, we AFFIRM.

* This order and judgment has no precedential value and may not be cited, except for the purposes of establishing the doctrines of law of the case, res judicata, or collateral estoppel. 10th Cir. BAP L.R. 8010-2.

¹ Unless otherwise noted, all future statutory references are to title 11 of the United States Code.

I. Background

John R. Guthrie (“Guthrie”), one of the debtors in the above-captioned Chapter 7 case, executed two promissory notes related to his business, “Carman’s Greenhouse,” in favor of BancFirst.² The maturity dates on both notes were within 90 days of July 15, 1996, the date that Guthrie and his spouse (“Debtors”) filed a Chapter 7 petition (“Petition Date”). Facts related to each of the notes are stated below.

A. The Line of Credit

In 1994, Guthrie executed and delivered a promissory note in favor of BancFirst in the approximate amount of \$25,000, which evidenced a seasonal working capital line of credit (“Credit Line”). The Credit Line had a four-month term, and principal and interest due thereunder was to be paid by January, 1996. The note was secured by stock owned by Vera Redwine, Guthrie’s mother-in-law (“Redwine’s Stock”).

On December 28, 1994, nine days prior to the expiration of the four-month term, Guthrie and BancFirst entered into a Deferral/Extension Agreement related to the Credit Line (“First Credit Extension”). Under the First Credit Extension, the maturity date of the Credit Line was extended until June 30, 1995. Guthrie paid the principal balance of the Credit Line to zero at the time that the First Credit Extension was entered into.

On June 28, 1995, two days prior to the maturity date of the First Credit Extension, Guthrie and BancFirst entered into a second Deferral/Extension Agreement (“Second Credit Extension”). Under this Extension, the maturity date of the Credit Line was extended until December 31, 1995. Guthrie and BancFirst agreed to defer payment of the principal balance of \$15,000, and Guthrie paid interest on the balance through June 30, 1995.

On January 4, 1996, four days after the expiration of the maturity date of the Second Credit Extension, Guthrie and BancFirst entered into a third Deferral/Extension

² The Debtors apparently also had a car loan and a real estate loan with BankFirst. However, there is very little information about these loans in the appellate record.

Agreement (“Third Credit Extension”). Under this Extension, the maturity date of the Credit Line was extended until June 30, 1996. Guthrie paid BancFirst \$24,714.61, and the remaining principal balance of \$335.39 was deferred, with interest paid on the balance thorough January 4, 1996.

On May 14, 1996, six weeks prior to the maturity date of the Third Credit Extension, Guthrie paid BancFirst \$10,000. On May 21, 1996, five weeks prior to the maturity date of the Third Credit Extension, Guthrie paid BancFirst the remaining principal balance due under the Credit Line of \$15,784.90 (collectively “the Credit Line Transfers”). The Credit Line Transfers were made within 90 days of the Debtors’ Petition Date.

B. The Capital Loan

In August 1995, Guthrie executed and delivered a promissory note in favor of BancFirst in the principal amount of \$20,108, which evidenced a seasonal working capital loan (“Capital Loan”). The Capital Loan’s maturity date was December 31, 1995, and all principal and interest were due on that date. This Loan was also secured by Redwine’s Stock.

On January 4, 1996, four days after the Capital Loan’s maturity date and on the same day as the Third Credit Extension, Guthrie and BancFirst entered into a Deferral/Extension Agreement related to the Capital Loan (“First Capital Extension”). This Extension extended the maturity date of the Capital Loan until April 5, 1996. Payment on the principal balance of \$20,108 was deferred, and Guthrie paid interest through January 2, 1996.

On April 3, 1996, two days prior to maturity date of the First Capital Extension, Guthrie and BancFirst entered into a Deferral/Extension Agreement related to the Capital Loan (“Second Capital Extension”), which extended the maturity date of the Capital Loan until June 30, 1996. At the time of this Extension, the entire principal balance of \$20,108 was deferred, and Guthrie paid interest through March 28, 1996.

On May 7, 1996, approximately seven weeks prior to the maturity date under the Second Capital Extension, Guthrie paid BancFirst \$20,108, thus paying the Capital Loan in full (“Capital Loan Transfer”). This Transfer occurred within 90 days of the Debtors’ Petition Date.

C. The Bankruptcy Case

After the Debtors filed their Chapter 7 case, the Trustee commenced a timely action against BancFirst, asserting that the Credit Line Transfers and the Capital Loan Transfer (collectively, the “Transfers”) were avoidable under § 547(b), and recoverable from BancFirst pursuant to § 550. BancFirst answered the Trustee’s complaint, admitting all material facts contained therein, and asserting an “ordinary course of business” defense under § 547(c)(2).

A pretrial order was entered, stipulating to all of the facts stated above. The only issue for trial was whether § 547(c)(2) barred the Trustee’s avoidance of the Transfers.³

After trial, the bankruptcy court entered an order, constituting its findings of fact and conclusions of law (“Order”). The bankruptcy court re-stated the above stipulated facts, and also made several findings related to the Debtors’ relationship with Poteau State Bank, the Debtors’ largest lender for the greenhouse business, and to the cause and timing of the Debtors’ financial problems.

³ BancFirst initially argued that the Transfers were not preferential under § 547(b) because § 547(b)(5) was not satisfied. At trial, however, BancFirst stipulated, despite its fully-secured position vis-a-vis Redwine’s Stock, that § 547(b), including subsection (5), had been met. Thus, the only issue before the bankruptcy court was whether a defense under § 547(c)(2) existed. While it is arguable that § 547(b)(5) was not met as BancFirst was fully secured, albeit by Redwine’s Stock which is not estate property, we will not exercise our discretion to disregard the parties’ stipulation regarding a question of law given the state of the record in this case. *See, e.g., Koch v. United States*, 47 F.3d 1015, 1018 (10th Cir.) (appellate court “is not bound by stipulations of the parties as to questions of law” (internal quotations omitted)), cert. denied, 516 U.S. 915 (1995), *quoted in Gitlitz v. Commissioner*, 182 F.3d 1143, 1146 (10th Cir. 1999); *see also In re Powerine Oil Co.*, 59 F.3d 969 (9th Cir. 1995) (fully secured creditor, secured by non-estate property, received a preference), cert. denied, 516 U.S. 1140 (1996).

Relying on its findings and the stipulated facts, the bankruptcy court concluded that BancFirst did not meet its burden of proof under the “subjective test” set forth in § 547(c)(2)(B) because the Transfers were not made in the ordinary course of business of the Debtors and BancFirst. In so holding, the bankruptcy court found it significant that the Transfers paid the Capital Loan and the Credit Line in full several weeks prior to their maturity dates, which was not in keeping with the parties’ past practice. The bankruptcy court also deemed it significant that both the Capital Loan and the Credit Line were secured by Redwine’s Stock, giving Guthrie “every incentive to pay these loans in full prior to filing bankruptcy.”

Based on its findings of fact and conclusions of law set forth in its Order, the bankruptcy court entered a judgment in favor of the Trustee in the total amount of \$46,147.05. BancFirst filed a timely appeal from the bankruptcy court’s final order and judgment, and the parties have consented to this Court’s jurisdiction. *See* 28 U.S.C. §§ 158(a)(1) & (c)(1); Fed. R. Bankr. P. 8001(a) & 8002(a); 10th Cir. BAP L.R. 8001-1.

II. Discussion

The only issue on appeal is whether the bankruptcy court's decision under § 547(c)(2)(B) is clearly erroneous. Clark v. Balcor Real Estate Fin., Inc. (In re Meridith Hoffman Partners), 12 F.3d 1549, 1553 (10th Cir. 1993) (a determination under § 547(c)(2)(B) is a factual issue, reviewed under a clearly erroneous standard of review) (citing Fidelity Sav. & Inv. Co. v. New Hope Baptist, 880 F.2d 1172, 1177 (10th Cir. 1989) (per curiam)), cert. denied, 512 U.S. 1206 (1994); accord Tomlins v. BRW Paper Co. (In re Tulsa Litho Co.), 229 B.R. 806, 807 (10th Cir. BAP 1999) (citing Payne v. Clarendon Nat'l Ins. Co. (In re Sunset Sales, Inc.), 220 B.R. 1005, 1020 (10th Cir. BAP 1998), *aff'd*, 1999 WL 974171, __ F.3d __ (10th Cir. filed Oct. 26, 1999)). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Anderson v. City of Bessemer City, 470 U.S. 564, 573 (1985) (internal quotation omitted).

Section 547(c)(2) provides:

(c) The trustee may not avoid under this section a transfer—

....

(2) to the extent that such transfer was—

- (A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;
- (B) made in the ordinary course of business or financial affairs of the debtor and the transferee; and
- (C) made according to ordinary business terms[.]

11 U.S.C. § 547(c)(2). The bankruptcy court correctly held that § 547(c)(2)(B) creates a subjective test, *i.e.*, whether the transfers were ordinary as between the parties. Order, pp. 5-6 (citing Sunset Sales, 220 B.R. at 1020). In determining whether payments are ordinary as between the parties, courts look to the following factors:

1. the length of time the parties were engaged in a transaction;
2. whether the amount or form of tender differed from past practices;
3. whether the creditor or debtor engaged in any unusual collection or payment activity; and
4. the circumstances under which the payment was made.

Sunset Sales, 220 B.R. at 1020-21, *quoted in* Tulsa Litho, 229 B.R. at 809. “These factors are typically considered by comparing pre-preference period transfers with preference period transfers.” Sunset Sales, 220 B.R. at 1021. BancFirst has the burden of proof under § 547(c)(2) and must show by a preponderance of the evidence that all of the elements of § 547(c)(2) have been met. 11 U.S.C. § 547(g); Meridith Hoffman Partners, 12 F.3d at 1553; Tulsa Litho, 229 B.R. at 809.

The bankruptcy court’s conclusion that the Transfers were not in the ordinary course of the Debtors and BancFirst’s business is not clearly erroneous because the stipulated facts demonstrate that Guthrie engaged in unusual payment activity during the preference period. Based on these stipulated facts, we do not have a definite and firm conviction that a mistake has been committed.

Prior to the preference period, Guthrie paid the Credit Line in lump sum payments in order to obtain an extension of the Credit Line. These payments were always made either several days before or after the maturity date of the Credit Line. In contrast, during the preference period, Guthrie paid the Credit Line in full in two lump-sum payments a week apart, several weeks prior to the maturity date of the Credit Line. On the Capital Loan, Guthrie had never made a payment in full on the Loan prior to the preference period, but rather continually deferred payment of the principal balance. During the preference period, however, Guthrie paid the Capital Loan in its entirety in one lump sum payment several weeks prior to its maturity date.

In addition, and significantly, is the fact that prior to the preference period, Guthrie always made payments followed by an extension of the Credit Line or Capital

Loan. As a result, BancFirst did not release its interest in Redwine's Stock. During the preference period, however, the Transfers were not followed by an extension of credit and, as a result, BancFirst, having been paid in full with no outstanding debt, released its interest in Redwine's Stock. Ironically for BancFirst, this release of its interest in Redwine's Stock supports the bankruptcy court's conclusion under § 547(c)(2)(B).

BancFirst emphasizes that the Transfers were early payments on the Credit Line and the Capital Loan that paid the debts in full prior to their respective maturity dates. BancFirst seems to contend that when a debtor pays its debts in full prior to a maturity date, such a transfer is presumptively "ordinary." Yet, in this case, the very fact that the Transfers were made several weeks prior to the maturity dates in question supports the bankruptcy court's conclusion that they were not "ordinary" between the Debtors and BancFirst. In the parties' earlier transactions, Guthrie had not made payments several weeks prior to the maturity date of the Capital Loan or the Credit Line and, therefore, the bankruptcy court's decision is not clearly erroneous.

BancFirst also contests several specific factual findings of the bankruptcy court related to when Guthrie knew he would quit business, Guthrie's relationship with Poteau State Bank, and Guthrie's motive in paying off the Capital Loan and the Credit Line. Regardless of whether such facts are supported by the record or not, however, the stipulated facts in this case support the bankruptcy court's conclusion under § 547(c)(2)(B).

III. Conclusion

For the reasons set forth above, the bankruptcy court is AFFIRMED.